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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92059305
Party	Plaintiff MWR Holdings, LLC
Correspondence Address	WILLIAM W STROEVER GREENBERG TRAURIG LLP 200 PARK AVENUE, PO BOX 677 FLORHAM PARK, NJ 07932-0677 UNITED STATES stroeverw@gtlaw.com, ameliom@gtlaw.com, njdocket@gtlaw.com
Submission	Motion to Amend Pleading/Amended Pleading
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Signature	/William W. Stroever/
Date	04/16/2015
Attachments	Motion for Leave to Amend.pdf(774333 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MWR HOLDINGS, LLC,

Petitioner,

v.

THEODORE A. STONER,

Registrant.

Cancellation No. 92059305

Mark: BONGO BI-LINGO BUDDY

Reg. No.: 3,700,403

Registered: October 20, 2009

**PETITIONER'S MOTION FOR LEAVE TO AMEND ITS PETITION TO
CANCEL**

Pursuant to Fed. R. Civ. P. 15 and 37 C.F.R. § 2.115, Petitioner MWR Holdings, LLC ("MWR"), by its undersigned counsel, hereby moves the Trademark Trial and Appeal Board (the "Board") for leave to amend MWR's Petition to Cancel. MWR seeks to add additional grounds for the cancellation of the subject trademark registration, Reg. No. 3,700,403 (the "'403 Registration"), based on information recently disclosed in discovery responses of Registrant Theodore A. Stoner ("Stoner").

In light of significant upcoming deadlines in this Cancellation, including MWR's deadline for Pretrial Disclosures, MWR also requests that the proceedings be suspended pending disposition of the instant Motion.

BACKGROUND

On June 5, 2014, MWR filed its Petition to Cancel in this Cancellation, requesting cancellation of the '403 Registration based on prior use by MWR of a confusingly similar mark, and based on the abandonment by Stoner of rights in the '403 Registration due to

non-use. Through the discovery process in this case, MWR has recently become aware that Stoner has never rendered the services of the '403 Registration in commerce. These additional facts justify cancellation of the '403 Registration on grounds that Stoner has not met the use in commerce requirements for registration, and on grounds of fraud on the Trademark Office.

On October 2, 2014, MWR served three sets of discovery requests on Stoner by First Class Mail, including MWR's First Interrogatories to Stoner; MWR's First Request for the Production of Documents to Stoner; and MWR's First Request for Admissions from Stoner. After months of attempting to obtain discovery responses from Stoner, and a Motion to Compel filed by MWR, Stoner eventually served responses to MWR's discovery requests, including interrogatory responses served by First Class Mail on March 11, 2015. (See responses attached as Exhibit 1). MWR's Interrogatory number 5 had requested: "For each month from Registrant's date of first use of Registrant's Mark until the present, state the sales volume of services provided by Registrant under Registrant's Mark." (*Id.* at 2-3). Stoner responded, "Registrant does not have any sales figures relating to Registrant's Services at issue in this proceeding as the International Class 41 services are offered to promote Registrant's Mark in connection with Registrant's other goods." (*Id.*).

On Monday, April 6, 2015, MWR reached out to Stoner to request Stoner's consent for an amendment to MWR's Petition to Cancel. On Wednesday, April 8, 2015, counsel for the parties held a telephone conference in which they discussed, among other things, the new grounds that MWR proposed adding to the Petition to Cancel. MWR's counsel requested Stoner's consent to this amendment, and Stoner's counsel indicated

that he would discuss the issues with his client. On Wednesday, April 15, 2015, counsel for MWR reached out to counsel for Stoner by email to check on the status of that consent. No response was received as of the filing of this Motion.

MWR's Pretrial Disclosures are currently due in this case by April 19, 2015, and MWR may be interested in moving for summary judgment on one or more of the new claims included in the proposed Amended Petition to Cancel. MWR has thus requested that the Board suspend these proceedings while it decides the instant Motion for Leave to Amend, in order to allow MWR sufficient time following the decision to file such a motion for summary judgment. MWR has attached the signed proposed Amended Petition to Cancel (attached as Exhibit 2), along with a second version (attached as Exhibit 3) highlighting the material added or changed in light of Stoner's discovery responses.

ARGUMENT

Consistent with Fed. R. Civ. P. 15(a), the Board liberally grants leave to amend pleadings at any stage of the proceedings when justice requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party. *See* Fed. R. Civ. P. 15(a); TBMP § 507.02; *Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ2d 1503 (TTAB 1993). Thus, in deciding a party's motion for leave to amend, the Board must consider whether there is undue prejudice to the non-moving party and whether the amendment is legally sufficient. *Hurley Int'l v. Paul and Joanne Volta*, 82 USPQ2d 1339, 1341 (TTAB 2007). In this case, MWR's Motion for Leave is timely, Stoner will suffer no prejudice, and MWR's proposed new claims are adequately pled, such that MWR's Motion for Leave should be granted.

Stoner will suffer no undue prejudice by way of this amendment as MWR has brought this Motion in a timely manner, neither party's trial period has started, and this Motion is based on information that has been in the possession of Stoner since prior to the beginning of this Cancellation. The new claims in MWR's proposed Amended Petition to Cancel are based on Stoner's statements that he has not made any sales of the services listed in the '403 Registration, but instead uses those services to promote sales of Stoner's other goods. These statements were made in Stoner's responses to MWR's First Set of Interrogatories, which responses were served on March 11, 2015 via First Class Mail. *See* Exh. 1 at 5. On Monday, April 6, 2015, MWR first reached out to Stoner to request consent for this amendment, and having not received that consent, makes this Motion on April 16, 2015. The Board has found previously that such a short delay does not create undue prejudice to a non-moving party. *See, e.g., Karsten Mfg. Corp. v. Editoy AG, et al.*, 79 USPQ2d 1783, 1786 (TTAB 2006) (holding that a Motion for Leave to Amend that was filed 3 months after the moving party learned of relevant information was timely). Stoner would thus face no prejudice by this Motion, much less undue prejudice.

Nor would MWR's proposed amendments violate settled law, as the new claims are pleaded with sufficient detail to meet the federal pleading standards. As part of this Amended Petition to Cancel, MWR will plead that Stoner has not used the mark in the '403 Registration in commerce at any time, including prior to the issuance of the '403 Registration. It is well settled that the registration of a mark that does not meet the use in commerce requirement is void ab initio. *Couture v. Playdom, Inc.*, 778 F.3d 1379, 1381 (Fed. Cir. 2015). The term "use in commerce" means the bona fide use of a mark in the

ordinary course of trade, and not merely to reserve a right in a mark. 15 U.S.C. § 1127. MWR's proposed Amended Petition to Cancel pleads facts that will satisfy these requirements.

Similarly, MWR's proposed fraud claim is well pleaded. Fraud in procuring a trademark registration occurs when an applicant knowingly makes false, material representations of fact in connection with his application. *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009). As noted above, and as pleaded in the Amended Petition to Cancel, in filing its Statement of Use during the prosecution of the '403 Registration, despite being aware that it had not made any sales of the subject services, Stoner knowingly made a false, material representation of fact in connection with his application. The facts as pleaded support a finding of fraud on the Trademark Office that warrants cancellation of the '403 Registration. MWR's Amended Petition to Cancel therefore does not violate settled law, and MWR respectfully submits that leave should be granted to file this Amended Petition.

Justice further requires that the Board grant MWR's Motion for Leave to Amend in order to allow MWR to move for summary judgment on one or more of these new claims. The Board will not entertain claims or defenses that are not asserted in the pleadings as originally filed, or as amended or deemed amended. TBMP § 507.01. This Cancellation may be capable of speedy resolution by way of summary judgment, but MWR will not be able to move for summary judgment on this newly discovered evidence without the Board granting it leave to amend. As such, MWR requests that the Board grant MWR's Motion for Leave to Amend in the interest of justice.


MWR has additionally requested that the Board suspend the proceedings pending the disposition of this Motion for Leave to Amend. Proceedings may be suspended for good cause. TBMP § 510.03(a). In this case good cause exists because MWR needs to know whether it will be permitted to amend its Petition to Cancel in order to plan potential dispositive motions, and in order to properly prepare its Pretrial Disclosures (which are currently due April 19, 2015). MWR's Motion for Leave to Amend is based on information obtained from Stoner after the close of discovery. MWR has diligently sought to add this new information and these new claims into its Petition to Cancel, and the time crunch faced by MWR is not of MWR's doing. Good cause exists for a suspension and MWR respectfully requests that the Board suspend proceedings pending the disposition of this Motion.

CONCLUSION

For the foregoing reasons, MWR respectfully requests that the Board grant MWR leave to amend its Petition to Cancel, and suspend these proceedings during the pendency of this Motion for Leave.

Dated: April 16, 2015

GREENBERG TRAURIG, LLP

By: 
William W. Stroeve
200 Park Avenue
P.O. Box 677
Florham Park, NJ 07932-0677
Tel. 973-443-3524
Fax 973-295-1291
stroeverw@gtlaw.com

Attorneys for Petitioner
MWR Holdings, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing PETITIONER'S MOTION FOR LEAVE TO AMEND ITS PETITION TO CANCEL has been served on Theodore A. Stoner by mailing said copy on April 16, 2015, via First Class Mail, postage prepaid to:

Matthew H. Swyers
The Trademark Company PLLC
344 Maple Ave. W, Suite 151
Vienna, VA 22180



William W. Stroeve

EXHIBIT 1

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board**

In the matter of U.S. Registration 3,700,403
For the mark BONGO BI-LINGO BUDDY
Registered on the Principal Register on October 20, 2009

MWR Holdings, LLC,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No. 92059305
	:	
Stoner, Theodore A.,	:	
	:	
Registrant.	:	

**REGISTRANT’S ANSWERS AND OBJECTIONS TO
PETITIONER’S FIRST SET OF INTERROGATORIES**

TO: MWR HOLDINGS, LLC c/o William W. Stroeever, Greenberg Traurig, LLP, 200
Park Ave, Florham Park, NJ 07932.

FROM: THEODORE A. STONER c/o Matthew H. Swyers, Esq., The Trademark
Company, PLLC, 344 Maple Avenue West, PBM 151, Vienna, VA 22180.

COMES NOW the Registrant Theodore A. Stoner (hereinafter “Registrant”) and provides the
instant Answers to Petitioner MWR Holdings, LLC’s (hereinafter “Petitioner”) First Set of
Interrogatories providing as follows:

INTERROGATORIES

INTERROGATORY NO. 1:

Identify each individual involved on behalf of Registrant in the provision of services under Registrant's
Mark.

ANSWER: Theodore A. Stoner
127 West Fairbanks Ave, #492
Winter Park, FL 32789

INTERROGATORY NO. 2:

Describe in detail the circumstances surrounding Registrant's alleged first use of Registrant's Mark anywhere, which purportedly occurred on June 8, 2004.

ANSWER: Registrant first used Registrant's Mark at a New York trade show where Registrant performed a live performance under Registrant's Mark.

INTERROGATORY NO. 3:

Describe in detail the circumstances surrounding Registrant's alleged first use of Registrant's Mark in commerce, which purportedly occurred on June 18, 2008.

ANSWER: Upon further review Registrant first used Registrant's Mark in interstate commerce at the New York trade show that took place on June 8, 2004 where Registrant first performed the show outside of Colorado.

INTERROGATORY NO. 4:

Identify each individual who participated in the creation and adoption of Registrant's Mark.

ANSWER: Theodore A. Stoner
127 West Fairbanks Ave, #492
Winter Park, FL 32789

INTERROGATORY NO. 5:

For each month from Registrant's date of first use of Registrant's Mark until the present, state the sales volume of services provided by Registrant under Registrant's Mark.

ANSWER: Registrant does not have any sales figures relating to Registrant's Services at issue in this proceeding as the International Class 41 services are offered to promote Registrant's Mark in connection with Registrant's other goods.

INTERROGATORY NO. 6:

Describe the target class of consumers to whom Registrant provides Registrant's Services.

ANSWER: Registrant targets children ages 3 to 6.

INTERROGATORY NO. 7:

Identify the date Registrant first became aware of Petitioner's use of Petitioner's Mark in the United States.

ANSWER: Registrant first became aware of Petitioner's use of Petitioner's Mark in the United States when Petitioner filed the instant Cancellation Proceeding on June 5, 2014.

INTERROGATORY NO. 8:

Describe with particularity all advertising conducted by Registrant relating to Registrant's Mark.

ANSWER: Registrant has advertised Registrant's Mark through Registrant's websites, social media accounts, personal sales and live shows to various children's institutions, public relations articles, and live trade shows.

INTERROGATORY NO. 9:

For each year since Registrant's date of first use of Registrant's Mark until the present, state the annual advertising and promotion expenditures in the United States for Registrant's Services.

ANSWER: Registrant has spent about \$5,000 average annually since first beginning to use Registrant's Mark in advertising and promotion expenditures.

INTERROGATORY NO. 10:

State all facts upon which Registrant intends to rely to prove that there is no likelihood of confusion between Registrant's Mark and Petitioner's Mark.

ANSWER: Applicant objects to the instant request on the grounds that it is overly broad and burdensome given the inclusion of the term "All" and that it calls for information protected by the attorney client privilege and / or work product doctrine.

Respectfully submitted this 11th day of March, 2015.

THE TRADEMARK COMPANY, PLLC

/Matthew H. Swyers/

Matthew H. Swyers, Esq.

344 Maple Avenue West, Suite 151

Vienna, VA 22180

Tel. (800) 906-8626

Facsimile (270) 477-4574

mswyers@TheTrademarkCompany.com

Counsel for Registrant

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board**

In the matter of U.S. Registration 3,700,403
For the mark BONGO BI-LINGO BUDDY
Registered on the Principal Register on October 20, 2009

MWR Holdings, LLC,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No. 92059305
	:	
Stoner, Theodore A.,	:	
	:	
Registrant.	:	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing this 11th day of March, 2015,
to be served, via first class mail, postage prepaid, upon:

William W. Stroeve
Greenberg Traurig, LLP
200 Park Ave
Florham Park, NJ 07932

/Matthew H. Swyers/
Matthew H. Swyers

EXHIBIT 2

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MWR HOLDINGS, LLC,

Petitioner,

v.

THEODORE A. STONER,

Registrant.

Cancellation No. 92059305

Mark: BONGO BI-LINGO BUDDY

Reg. No.: 3,700,403

Registered: October 20, 2009

AMENDED PETITION TO CANCEL

Petitioner MWR Holdings, LLC (“Petitioner”) believes that it is being harmed and damaged by the continued existence of U.S. Trademark Reg. No. 3,700,403 of October 20, 2009 for the mark “BONGO BI-LINGO BUDDY” for “Entertainment in the nature of live theatrical performances by mixed media of live characters, puppetry and animation for children; Organizing cultural events for children; Education services, namely, providing professional training in the field of bilingual learning”, in Class 41. Petitioner accordingly petitions for the cancellation thereof, and pleads as follows:

1. Petitioner is a limited liability company organized under the laws of Delaware having a business address of 4855 Technology Way, Suite 700, Boca Raton, Florida 33431.

2. Upon information and belief, Theodore A. Stoner (“Respondent”) is an individual having an address of 127 West Fairbanks Ave., #492, Winter Park, FL 32789.

3. Respondent is the registrant of record for Reg. No. 3,700,403 of October 20, 2009 for the mark “BONGO BI-LINGO BUDDY” for “Entertainment in the nature of live theatrical performances by mixed media of live characters, puppetry and animation for children;

Organizing cultural events for children; Education services, namely, providing professional training in the field of bilingual learning”, in Class 41 (the “‘403 Registration”). The application which matured into the ‘403 Registration was filed on February 10, 2006 based on an intent to use under Section 1(b). Respondent asserted an actual first date of use in commerce of June 8, 2004. Respondent asserted a date of constructive use of the mark of June 18, 2008.

4. Petitioner is the owner of the mark “BONGO BEAR” for “Entertainment services, namely live theatrical performances featuring electronically animated characters for use in child development and personal appearances by a costumed character” in Class 041 (the “Petitioner’s Services”). Petitioner has continuously used its “BONGO BEAR” mark in commerce for Petitioner’s Services since March 1, 2003. Petitioner’s Services were first used in commerce before Respondent’s constructive or actual usage of the mark in the ‘403 Registration.

5. Petitioner has filed Application Serial No. 86/146,757 for registration of its BONGO BEAR mark for the Petitioner’s Services (the “Petitioner’s Application”).

6. The U.S. Patent and Trademark Office has issued a Section 2(d) rejection of Petitioner’s Application based upon a likelihood of confusion with the Respondent’s mark in the ‘403 Registration.

7. The mark in the ‘403 Registration “BONGO BI-LINGO BUDDY” is confusingly similar to the mark “BONGO BEAR” in Petitioner’s Application, and is for services that are identical or closely related to Petitioner’s Services.

8. Petitioner has continuously used and is using its mark BONGO BEAR for Petitioner’s Services from a time prior to Respondent’s constructive and actual first date of use of the mark in the ‘403 Registration.

9. The continued existence of the '403 Registration is likely to cause harm and damage to Petitioner in that it falsely represents to the public that Respondent has rights in and to the mark in the '403 Registration inconsistent with those of Petitioner as a prior user, and in that there is a false presumption of rights in the Respondent associated with the '403 Registration, which is inconsistent with Petitioner's superior rights. In addition, the existence of the '403 Registration falsely suggests to the public that, by virtue of the registration, there is an association between Petitioner and Respondent, or that services marketed by Respondent under the mark "BONGO BI-LINGO BUDDY" are in some manner associated with Petitioner, when they are not.

10. The continued existence of the '403 Registration is likely to cause further harm and damage to Petitioner in that Petitioner will be wrongfully prevented from registering the mark in Petitioner's Application, all to the detriment of Petitioner.

11. As a further grounds for cancellation, Petitioner asserts, upon information and belief, that Respondent has abandoned the mark by discontinuing its use of the mark with an intent not to resume such use.

12. As a further grounds for cancellation, Petitioner asserts, upon information and belief, that Respondent has not ever made actual use in commerce of the mark in the '403 Registration in connection with the services listed in the '403 Registration. Upon information and belief, the services listed in the '403 Registration are not rendered in commerce by Respondent under the BONGO BEAR mark, and Respondent is not engaged in commerce in connection with the services listed in the '403 Registration under the BONGO BEAR mark. The '403 Registration is therefore void ab initio.

13. The application for the '403 Registration was filed February 10, 2006 as an intent-to-use application.

14. On September 1, 2009, Stoner filed a Statement of Use in which he made the declaration that "[t]he mark is in use in commerce on or in connection with the following goods or services listed in either the application or Notice of Allowance or as subsequently modified for this specific class: Entertainment in the nature of live theatrical performances by mixed media of live characters, puppetry and animation for children; Organizing cultural events for children; Education services, namely, providing professional training in the field of bilingual learning." Stoner further alleged in the Statement of Use that the mark in the '403 Registration had been first used in commerce at least as early as June 18, 2008.

15. Had Stoner not filed a Statement of Use, the USPTO would not have issued the '403 Registration.


16. Upon information and belief, in making and submitting his Statement of Use, Stoner knowingly and intentionally made the misrepresentation to the USPTO that he was using the services listed in the '403 Registration in commerce, even though he was not.

17. Upon information and belief, Stoner was aware that the above misrepresentations were false at the time they were made.

18. Upon information and belief, Stoner made the statements in his Statement of Use with the intention that the USPTO would accept and rely on them and register the BONGO BILINGO BUDDY mark in connection with the services listed in the '403 Registration.

Dated: April 16, 2015

GREENBERG TRAURIG, LLP

By: 
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stroevevw@gtlaw.com

Attorneys for Petitioner
MWR Holdings, LLC

EXHIBIT 3

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1. Petitioner is a limited liability company organized under the laws of Delaware having a business address of 4855 Technology Way, Suite 700, Boca Raton, Florida 33431.

2. Upon information and belief, Theodore A. Stoner (“Respondent”) is an individual having an address of 127 West Fairbanks Ave., #492, Winter Park, FL 32789.

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9. The continued existence of the '403 Registration is likely to cause harm and damage to Petitioner in that it falsely represents to the public that Respondent has rights in and to the mark in the '403 Registration inconsistent with those of Petitioner as a prior user, and in that there is a false presumption of rights in the Respondent associated with the '403 Registration, which is inconsistent with Petitioner's superior rights. In addition, the existence of the '403 Registration falsely suggests to the public that, by virtue of the registration, there is an association between Petitioner and Respondent, or that services marketed by Respondent under the mark "BONGO BI-LINGO BUDDY" are in some manner associated with Petitioner, when they are not.

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12. As a further grounds for cancellation, Petitioner asserts, upon information and belief, that Respondent has not ever made actual use in commerce of the mark in the '403 Registration in connection with the services listed in the '403 Registration. Upon information and belief, the services listed in the '403 Registration are not rendered in commerce by Respondent under the BONGO BEAR mark, and Respondent is not engaged in commerce in connection with the services listed in the '403 Registration under the BONGO BEAR mark. The '403 Registration is therefore void ab initio.

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15. Had Stoner not filed a Statement of Use, the USPTO would not have issued the ‘403 Registration.

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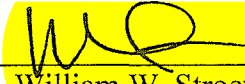
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Dated: April 16, 2015

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Attorneys for Petitioner

MWR Holdings, LLC